

State Update*

By Benedict Cabaltica, Marianne Evans and Ann Holley

State Economic Nexus Principles: A Gordian Knot for Financial Services Providers?

One of the most baffling issues in the area of state and local taxation is the issue of nexus. The term “nexus” literally means connection or link.¹ For state tax purposes, the term “nexus” means that an out-of-state company has sufficient connections with the state for that state to subject the company to tax. Both the Due Process Clause² and the Commerce Clause³ of the U.S. Constitution impose limitations on the states’ power to tax out-of-state businesses.⁴ While the constitutional concerns and policies of these two clauses are different, both require a connection between a state and the person, property or transaction it seeks to tax.⁵ Taxpayers often struggle with how much and what types of connections to a state can create a tax return filing obligation (i.e., subject a taxpayer to tax).

In recent years, there have been a number of income tax cases addressing the constitutional boundaries of nexus. The majority of these cases involve entities that primarily license trademarks and tradenames to related entities. The applicability of these cases in the financial services context is unclear at best. Generally, financial services companies struggle with whether having a customer in a state or a loan secured by property in the state is sufficient to require a filing obligation. A nexus issue also may arise if a company holds a security or product with links to in-state customers or property.

Most recently, the U.S. Supreme Court denied certiorari in a nexus case involving a credit card issuer.⁶ Taxpayers in the financial services area were hoping for additional guidance from the U.S. Supreme Court but such hopes were dashed. Taxpayers are once again left with a complex problem (what triggers state income tax filing obligations) with no clear solution and possibly only one likely avenue for resolution—the U.S. Congress. For some this may be the perfect storm; for most it is more likely the proverbial Gordian Knot.⁷

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This column provides a brief history of the nexus standards, explains how these standards generally have been applied in the context of financial services companies to date, and finally discusses the potential effect of the recent denial of certiorari on these issues.

A. History of Nexus Standards

1. Physical Presence Required

The longstanding rule governing state taxation provides that states may impose taxes on an out-of-state company only if that company or its representative has a physical presence in the taxing state. In *National Bellas Hess, Inc. v. Department of Revenue of Illinois*,⁸ the Court stated that the distinction between companies with in-state business locations, property, or solicitors and companies that communicate with in-state customers solely by telephone or mail was a valid distinction that the Court “decline[d] to obliterate.”⁹ *National Bellas Hess* involved a mail order company whose only contacts with Illinois were solicitation of sales by catalogs and delivery of goods by common carrier or U.S. mail. Citing both the Commerce Clause and the Due Process Clause, the Court struck down Illinois’ attempt to require the company to collect use taxes on sales of merchandise to customers located in Illinois. The Court reasoned that the administrative burdens that would be borne by the seller if all states and localities had the power to impose such an obligation would “entangle National’s interstate business in a virtual welter of complicated obligations to local jurisdictions with no legitimate claim to impose a fair share of the cost of the local government.”¹⁰ Thus, the Court provided a “bright-line” physical presence test for taxpayers to use to analyze their sales and use tax collection responsibilities.

2. Physical Presence Reaffirmed

Twenty-five years later, the Court again considered whether an out-of-state seller with no employees, agents or property in the state could be required to collect sales/use tax on sales to customers in the state. *Quill v. North Dakota*¹¹ was factually similar to *National Bellas Hess* and likely arose because states were dissatisfied with the ruling in *National Bellas Hess*.

The Court held that the Due Process Clause nexus standard is met if an out-of-state corporation purposefully directs its activities towards residents of the taxing state irrespective of a corporation’s lack of physical presence in the taxing state.¹² For purposes of the Commerce Clause, however, the *Quill* Court declined to overrule the “physical presence” test that *National Bellas Hess* established for sales and use taxes. Instead, the Court noted that the Commerce Clause was intended to limit state burdens on interstate commerce. According to the Court, the bright-line rule of *National Bellas Hess* furthers this end. The Court pointed out that the Constitution granted Congress the power to regulate interstate commerce and indicated that federal legislation might be a more appropriate way to resolve these issues.¹³ Thus, the Court held that the state could not require an out-of-state seller to collect sales/use tax unless the seller had a physical presence in the state.

For state tax purposes, the term “nexus” means that an out-of-state company has sufficient connections with the state for that state to subject the company to tax.

3. Physical Presence Requirement Limited to Sales and Use Taxes?

Throughout the *Quill* decision there are frequent and specific references to sales and use taxes. For example, the *Quill* Court noted that “[a]lthough we have not, in our review of other types of taxes, articulated the same physical presence requirement that *Bellas Hess* established for sales and use taxes, that silence does not imply repudiation of the *Bellas Hess* rule.”¹⁴ Also, the Court commented that “although in our cases subsequent to *Bellas Hess* and concerning other types of taxes we have not adopted a similar bright-line, physical presence requirement, our reasoning in those cases does not compel that we now reject the rule that *Bellas Hess* established in the area of sales and use taxes.”¹⁵ Based on such language, some states have interpreted the physical presence standard to relate only to the collection of sales and use taxes and not to the imposition of other taxes, such as income and franchise taxes.¹⁶ Based on this narrow interpretation of *Quill*, some states have asserted taxing authority over out-of-state companies that are not physically present in the state. This “economic nexus” theory is based on the concept that the exploitation of a state’s marketplace for profit is sufficient to create nexus.

4. State's Application of Economic Nexus Theory

The first state supreme court case that upheld the position that *Quill* was limited to sales and use taxes was *Geoffrey, Inc. v. South Carolina Tax Commission*.¹⁷ *Geoffrey* was a Delaware intangible holding company that licensed trademarks and trade names to its grandparent corporation, Toys 'R' Us, which did business in South Carolina. On its South Carolina income tax return, Toys 'R' Us deducted royalty payments made to *Geoffrey* from its South Carolina taxable income. In *Geoffrey*, the South Carolina Supreme Court held that "the taxpayer need not have a tangible, physical presence in a state for income to be taxable there. The presence of intangible property alone is sufficient to establish nexus."¹⁸

The Supreme Court of South Carolina held that licensing these intangibles to a corporation that did business in South Carolina created sufficient nexus under the Due Process and Commerce Clauses to subject *Geoffrey* to the South Carolina income tax. The South Carolina Supreme Court distinguished *Quill* and *National Bellas Hess* as sales and use tax cases whose rules did not apply to income tax cases.¹⁹ The court held that the mere presence of intangible property was sufficient to create substantial nexus under the Commerce Clause. Therefore, in the court's view, the affiliate's use of the intangibles in South Carolina to derive income in South Carolina constituted substantial nexus. The U.S. Supreme Court denied the taxpayer's writ of certiorari.

In the aftermath of the *Geoffrey* decision, a number of states have successfully argued the position that the physical presence rule under *Quill* was limited to sales and use taxes and imposed income or franchise tax on out-of-state intangible holding companies that licensed intellectual property for in-state use by affiliated companies.²⁰

B. How Nexus Standards Have Been Applied to Financial Services Entities

The body of economic nexus jurisprudence is largely in the context of licensing trademarks and trade

names. As in *Geoffrey*, most of the economic nexus cases confer nexus in situations where an entity's in-state presence is limited to the use of an "intangible" in the state. The applicability of such case law to the financial services arena is unclear. Mortgages, credit card receivables, and various other financial instruments could be considered intangibles that create nexus. Consider the following scenario: A financial services company, physically located in State X, issues a mortgage to a customer, who resides in State Y. The mortgage is secured by property in State Z. Under a *Geoffrey* or economic nexus theory, where should the financial service company file income tax returns? Is a return required in State Y under the theory that the company exploited State Y's market by soliciting and issuing a mortgage to a resident of that state? Could State Z also successfully argue that the financial services company has exploited its marketplace because the property securing the loan is located in State Z?

[O]n a practical basis, it seems likely that more states will attempt to use the recent denial of certiorari in *MBNA* to support taxation of out-of-state companies based on economic nexus principles.

Some states have specific statutory nexus guidance for financial services companies.²¹ Such guidance typically ranges from a general description of lending activities that will trigger the requirement to file an income tax return, to more quantitative triggers such as provisions that delineate specific numbers of customers, deposits and/or loans in the state that will generate nexus with the state. Florida, for example, has a relatively broad nexus provision that imposes tax on financial organizations that earn or receive interest from loans secured by real or tangible personal property in the state, regardless of where the interest is received.²² While this provision seems relatively straight forward, what if an entity participates in a loan secured by Florida real property? Is a filing obligation required even if the taxpayer has never been in the state or solicited the loan from the customer? What if an entity holds a security backed by loans secured by Florida property? While nexus in both of these scenarios seems tenuous, the correct answer is not clear.

Indiana and Tennessee are among the states that have specific quantitative statutory triggers for the filing of an income tax return. For example, Indiana's nexus statute has a presumption of nexus if the entity has (i) twenty customers in the state; or (ii) \$5 mil-

lion in loans or deposits from Indiana customers.²³ On the other hand, Tennessee's nexus presumption statute only provides that the entity have \$5 million in assets or deposits from Tennessee customers.²⁴ The Tennessee nexus provisions are particularly important because Tennessee is one of the few states that imposes an income tax on a company that is treated as flow-through entity for federal income tax purposes. As a result, Tennessee may impose an income tax on federally disregarded entities such as limited liability companies.

Theoretically, quantitative nexus provisions such as these could have implications on the securitization markets by requiring securitization vehicles and/or security holders to file in the subject state. Luckily, some (but not all) states have recognized the potential implications on financial products and have provided exceptions from the nexus provisions. For example, Tennessee will not impose a filing obligation on an entity: (i) that is classified as a partnership, trust, REMIC, or FASIT for federal tax purposes, and (ii) if the sole purpose of the entity is the securitization of debt obligations.²⁵ Tennessee also provides another exception for certain diversified investing firms, limited liability companies, limited liability partnerships and limited partnerships formed and operated for the primary purpose of buying, holding, or selling qualifying investment securities on its own behalf.²⁶

Although states seem emboldened in their efforts to reject the application of the physical presence test, few states have adopted a clear bright-line test that a taxpayer may use to determine if it has nexus with the state. And even in states where the nexus provisions are seemingly specific, the provisions leave taxpayers potentially guessing about the application of the rules.

C. Recent Economic Nexus Developments

The United States Supreme Court recently declined to review a case that could have shed some light on economic nexus for financial service companies. In *Tax Commissioner v. MBNA America Bank*, the West Virginia Supreme Court of Appeals ruled that *Quill's* physical presence requirement applied only to sales and use taxes and did not extend to business franchise and corporation net income taxes.²⁷ The West Virginia statute in question was one of the more specific state nexus provisions and contained a nexus presumption if a financial services company

has 20 customers or \$100,000 in receipts attributable to West Virginia residents.²⁸ The court held that the statute in question was constitutional. The court based its decision on a number of factors. First, the court held that a close reading of *Quill* indicated that its reaffirmation of the physical presence test for sales and use taxes was grounded primarily on *stare decisis*. Accordingly, the court stated that "because *Quill's* physical presence test for sales and use taxes was based in large part on the mail order industry's reliance on *Bellas Hess*, we are not compelled to apply *Quill's* physical presence standard to the present circumstances."²⁹ Secondly, the court concluded that a reasonable construction of the language used in the *Quill* opinion implies that *Quill* only applies to sales and use taxes. Third, the court noted that there are significant distinctions between sales and use taxes on the one hand, and franchise and income taxes on the other hand. Specifically, the court noted that compliance with sales and use tax laws is far more burdensome than compliance with income tax laws. Finally, the court concluded that the physical presence test made little sense in today's world where technology makes it possible to generate substantial business in a state without having a physical presence of some sort.

The court adopted a "significant economic presence test" as the proper test to determine whether substantial nexus exists for Commerce Clause purposes. The "significant economic presence test" would include analysis of purposeful direction towards a state as it relates to the Due Process standard, while examining the frequency, quantity and systematic nature of a taxpayer's economic contacts with the state as it relates to the Commerce Clause.³⁰

Finding that: (i) MBNA had continuously and systematically engaged in telephone and mail solicitations with West Virginia customers, and (ii) MBNA had significant gross receipts (\$8,419,431 in 1998 and \$10,163,788 in 1999) attributable to West Virginia customers, the court concluded that MBNA had a significant economic presence in West Virginia and thus had substantial nexus.

MBNA filed a petition for a writ of *certiorari* with the U.S. Supreme Court.³¹ The petition stated several reasons for granting the writ of *certiorari*, including: (i) there is conflict among the states; (ii) the appealed decisions are incorrect; and (iii) this is a pressing issue that needs to be resolved by the Court.³² Unfortunately, the Court denied *certiorari* in the case, leaving taxpayers and states without the much-anticipated

guidance that had been expected to resolve some of the outstanding issues.

D. Alternate Nexus Theories

States have not always succeeded in their attempts to impose nexus under an economic nexus theory. In those situations, states may attempt an alternate approach to gain nexus over an out-of-state taxpayer. Two Tennessee cases highlight this type of situation.

In *J.C. Penney National Bank v. Johnson*,³³ the Tennessee Court of Appeals held that an out-of-state bank not physically present in the state lacked the substantial nexus necessary under the Commerce Clause for Tennessee to impose a tax. Under the Tennessee franchise/excise tax on financial institutions, nexus can be based on an entity's "economic" presence within the state (*i.e.*, no physical presence is required) based on Tennessee's doing business standards which includes: (i) regularly selling products or services of any kind or nature to customers in Tennessee that receive the product or service in the state; (ii) regularly soliciting business from potential customers in the state; (iii) regularly engaging in transactions with customers in Tennessee that involve intangible property, including loans, and result in receipts flowing to the taxpayer from within the state; or (iv) regularly soliciting and receiving deposits from customers in the state. As previously noted, Tennessee's statutes also contain a presumption of nexus based on the number of customers and/or loans in the state.

J.C. Penney National Bank (JCPNB) had no offices, branches or employees in Tennessee but issued credit cards to Tennessee residents. The parent company operated retail stores in Tennessee. Virtually all of JCPNB's customers came from lists provided by these stores. Marketing and solicitation activities, customer inquiries and credit card processing were performed by various affiliates and third parties. All credit cards stated that the card remained the property of JCPNB. The court concluded that neither JCPNB's parent nor its affiliates conducted activities in Tennessee on JCPNB's behalf that were sufficient to establish nexus. Although the court declined to rule that the Commerce Clause requires a physical presence in all situations, it did find *Quill* controlling based on factual similarities between JCPNB's activities and *Quill*'s. In JCPNB's situation at least, the court invalidated the statutory presumption of nexus and mandated a physical presence test.

Four years later in *Dillard National Bank v. Johnson*,³⁴ a Tennessee trial court held that a credit card

bank affiliate of a department store chain did have nexus in Tennessee. The case bore some similarities to *J.C. Penney*; in both, the credit cards were labeled as property of the bank. However, the cards in *J.C. Penney* were Visas and MasterCard, while the *Dillard* cards could only be used in Dillard stores. In *J.C. Penney*, the retail stores did not solicit customers to open accounts with the affiliated bank. In contrast, in *Dillard*, applications for the credit cards were routinely solicited and completed in Dillard department stores, and payments were accepted in Dillard stores. The court also noted that the bank sent its own employees to store openings to solicit credit card applications and hired a third party to recruit for credit card accounts on Tennessee-based college campuses.

Although not entirely clear, it appears that the state focused its attack on different things in *Dillard* than in *J.C. Penney*. The state knew (based on *J.C. Penney*) that an economic nexus attack would likely prove fruitless. The court in *J.C. Penney* had ruled that physical presence was required in a similar fact pattern. With the economic nexus avenue of attack shut down, it appears that the state instead chose to focus on the in-state activities of affiliates.

In effect, the court in *Dillard* attributed the activities of the Dillard stores to Dillard National Bank to support its conclusion that the bank had physical presence in the state. This so-called "attributional nexus" is nothing new in the sales and use tax arena. Because it is well settled law that physical presence is required for sales and use taxes, states have legislatively and judicially instituted attributional nexus standards conferring in-state physical presence of affiliates to other entities. For example, several courts have upheld assessments where a state asserted nexus over on-line retailers based on the in-state presence of affiliates.³⁵ In *Borders*, the California Court of Appeals held that the local Borders store's acceptance of "returns" on behalf of the out-of-state on-line merchant vendor (*i.e.*, Borders Online) was sufficient to establish nexus for collection of use tax for Borders Online's sales to California purchasers. Several states have also passed legislation that outlines specific activities that create filing obligations for affiliated entities. For example, Indiana requires any person that is "closely related" to another person that maintains a place of business in Indiana, engages in the regular or systematic soliciting of retail transactions from potential customers in Indiana, or enters into a public contract with a state agency, to register and collect sales and use tax.³⁶ The term, "closely related"

is defined to include, for example, the use of identical or substantially similar names, trademarks or goodwill, persons that pay for each other's services under an arrangement that is contingent on sales volume or value, and entities that share a common business plan.³⁷ While the constitutionality of sales and use tax affiliate nexus provisions may be suspect,³⁸ several states have nevertheless adopted such provisions.³⁹

Applying these affiliate nexus provisions in the financial services arena will likely be no less confusing than economic nexus. For example, if affiliate nexus provisions were incorporated into a state's income tax law, would such provisions require a separately incorporated mortgage company to file everywhere an affiliated bank files (and vice versa)? Or, if an enterprise held its investment portfolio in a separate legal entity, would that entity be required to file in the state if any other "closely related" entity is a filer in the state? An affirmative answer to either of these questions would seem to stretch the bounds of what is permissible under the Constitution.

Current State

It remains to be seen whether states will become more aggressive as a result of the denial of certiorari in *MBNA*. Theoretically, the denial of certiorari means nothing. But on a practical basis, it seems

likely that more states will attempt to use the recent denial of certiorari in *MBNA* to support taxation of out-of-state companies based on economic nexus principles. Application of economic nexus principles to financial services and products will be particularly interesting. Owners of financial instruments often have little, if any, direct contacts with customers. As a result, the holders' nexus with the state is more tenuous. Theoretically, such nuances in facts should be significant in the determining whether a state has jurisdiction over the taxpayer. Nevertheless, taxpayers should be prepared to encounter controversy from states emboldened by the Court's action (or more appropriately, inaction).

So is there any bold stroke that could cut the Gordian knot of state income tax nexus? Perhaps. In *Quill*, the Court indicated that Congress might be the better branch of government to resolve this issue. Federal legislation has been introduced in the past that would seek to clarify the bounds of state tax nexus. Taxpayers seeking more clarity might consider lobbying Congress for legislation that would prohibit imposition of tax based on economic nexus theories.⁴¹ However, that approach obviously will not provide relief in the short run. In the meantime, taxpayers will need to give thoughtful consideration to the determination of whether they need to file a return in states where they have customers but no other physical presence in the state.

ENDNOTES

* The information contained herein is general in nature and based on authorities that are subject to change. Applicability to specific situations is to be determined through consultation with your tax advisor. The views and opinions are those of the authors and do not necessarily represent the views and opinions of KPMG LLP.

¹ BLACK'S LAW DICTIONARY (8th ed. 2004).

² U.S. CONST., amend. XIV, §1, which provides: ...No state shall make or enforce...; nor shall any state deprive any person of life, liberty, or property, without due process of law....

Taxation is regarded as the deprivation of a person's property. A state whose laws provide protection, security, and opportunities to individuals, property and businesses may exact a toll in the form of taxes to support the government, but not without due process of law. Courts have interpreted the Due Process clause as requiring an entity to have sufficient contacts with a state to legitimate the state's power over the entity.

³ U.S. CONST., art. 1, §8, which provides: The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

The Commerce Clause delegates certain powers to the federal government. By negative implication, states' powers are accordingly limited. The US Supreme Court has interpreted the Commerce Clause to prohibit a state tax that unduly interferes with interstate commerce. This prohibition exists even in the absence of affirmative action by Congress. Accordingly, a state cannot require an entity to file a return if such a filing (and the associated burdens) would interfere with interstate commerce.

⁴ Both Due Process Clause and Commerce Clause limitations apply to all types of taxes. See *Miller Bros. v. Maryland*, S Ct, 347 US 340, 344-45 (1954), for sales and use tax; *Allied-Signal, Inc. v. Dir., Div. of Taxation*, S Ct, 504 US 768, 777 (1992), for income tax; *Japan Line, Ltd. v. County of Los Angeles*, S Ct, 441 US 434 (1979), for property taxes.

⁵ See *Miller Bros.*, *supra*, 347 US, at 344-345; *Allied-Signal, Inc.*, *supra*, 504 US, at 777.

⁶ *Tax Comm'r v. MBNA America Bank*, 640 SE2d 226 (W. Va. 2006), *cert. denied*, *F/A Card Servs, N.A. v. Tax Comm'r*, 127 S Ct. 2997.

⁷ The Gordian Knot is a legend associated with Alexander the Great. It is often used as a metaphor for an intricate problem, insoluble on its own terms. Merriam Webster's Collegiate Dictionary, Tenth Edition (Merriam-Webster, Inc. 1994).

⁸ *Nat'l Bellas Hess v. Dept of Revenue of Ill.*, S Ct, 386 US 753 (1967).

⁹ *Id.* at 758.

¹⁰ *Id.* at 759-760.

¹¹ *Quill v. North Dakota*, S Ct, 504 US 298 (1992).

¹² *Id.* at 308.

¹³ The Court noted that it was possible that Congress had not acted previously because it did not have authority to enact legislation that would be contrary to the Due Process Clause. By holding that the Due Process Clause does not require a physical presence

in the case of sales and use taxes, the Court indicated its belief that it had “put that problem to rest.” Nevertheless, Congress has not enacted legislation addressing nexus in the 15 years since *Quill* was decided.

¹⁴ See *Quill*, *supra* note 11, 504 US, at 314.

¹⁵ *Id.* at 317.

¹⁶ While states have latched on to these specific references to sales and use taxes, others view such language merely as dicta.

¹⁷ *Geoffrey, Inc. v. S.C. Tax Comm’n*, 313 SC 15, 437 SE2d 13 (S.C. 1993), *cert. denied*, SCt, 510 US 992 (1993).

¹⁸ *Id.* at 18, 437 S.E.2d at 23.

¹⁹ *Id.* The Supreme Court of South Carolina held that Geoffrey’s reliance on the physical presence standard requirement under *National Bellas Hess* was misplaced. In footnote 4, the South Carolina court noted the following:

The U.S. Supreme Court recently revisited the physical presence requirement of *Bellas Hess* and, while reaffirming its vitality as to sales and use taxes, noted that the physical presence requirement had not been extended to other types of taxes. (citations omitted)

Geoffrey, Inc., *supra* note 17, 313 SC at 18, 437 SE2d at 23.

²⁰ Below is a sampling of the cases that followed the *Geoffrey* decision:

Kmart Properties, Inc. v. Tax’n & Rev. Dep’t, N.M. CtApp, 139 NM 177, 131 P3d 27 (2001). The New Mexico appellate court held that *Quill* did not extend its physical presence requirement beyond sales and use taxes and that substantial nexus exists when out of state passive investment companies (PICs) use their intangible property to derive income from New Mexico’s market.

Sec’y, Dept. Rev. v. GAP (Apparel), Inc., La. CtApp, 886 So2d 459 (2004). The Louisiana Court of Appeal held that marks licensed by an out-of-state PIC were used in Louisiana in such a way as to become an integral part of the licensees’ businesses in Louisiana, and thus, the PIC’s intangibles had acquired a business situs in Louisiana and were subject to taxation in Louisiana. However, the ruling involved only Due Process Clause jurisdiction.

A & F Trademark, Inc. v. Tolson, N.C. CtApp, 167 NCApp 150, 605 SE2d 187 (2004), *cert. denied*, 546 US 821, 126 SCt 353 (2005). The North Carolina Court of Appeals held that physical presence was not required to establish nexus for other than sales and use

tax purposes and that an intangible holding company was subject to corporate income and franchise taxes in the state in which trademarks, trade names, and service marks were licensed to an affiliated licensee.

Lanco, Inc. v. Dir., Div. of Taxation, N.J. SuperCt, 379 NJSuper 562, 188 NJ 380, 879 A2d 1234 (App. Div. 2005), *aff’d*, NJ SCt, 188 NJ 380, 908 A2d 176 (N.J. 2006), *cert.denied*, SCt, 127 SCt 2974 (2007). The New Jersey Supreme Court agreed with *A & F Trademark* and affirmed the appellate court ruling, which expressly held that common ownership between licensor and licensee is not material in determining the state’s imposition of tax.

Geoffrey, Inc. v. Okla. Tax Comm’n, Okla. CivApp, 132 P3d 632, (2005). The Court of Civil Appeals agreed with *Lanco* and *A & F Trademark* and added that the benefit received by the PIC was income derived from Oklahoma customers.

²¹ The following is a list of the specific requirements, in individual states, the satisfaction of which will be presumed to amount to taxable nexus: Indiana—20 customers or the sum of the value of assets and deposits equal to \$5 million, see Ind. Code §6-5.5-3-4; Kentucky—20 customers or \$100,000 gross receipts, see Ky. Rev. Stat. Ann. §136.520(1); Massachusetts—100 customers, \$10 million in assets, or \$500,000 in gross receipts, see Mass. Gen. Laws ch. 63, §1; Minnesota—20 customers or the sum of the value of assets and deposits equal to \$5 million, see Minn. Stat. §290.015 sub. 2; Tennessee—the sum of the value of assets and deposits equals or exceeds \$5 million, see Tenn. Code Ann. §67-4-2004(9)(B); West Virginia—20 customers or \$100,000 gross receipts, see W. Va. Code §11-24-7b(d).

²² Fla. Stat. Ann §220.02; Fla. Admin. Code Ann. §12C-1.011(1)(s).

²³ Ind. Code §6-5.5-3-4.

²⁴ Tenn. Code Ann. §67-4-2004(9)(B).

²⁵ Tenn. Code Ann. §67-4-2004(9)(C).

²⁶ Tenn. Code Ann. §67-4-2008(a)(12).

²⁷ *MBNA Am. Bank, N.A.*, 640 SE2d 226 (2006).

²⁸ W. Va. Code §11-24-7b(d).

²⁹ See *MBNA*, 640 SE2d at 232.

³⁰ See *MBNA*, 640 SE2d at 234.

³¹ A petition for a writ of *certiorari* was filed in another case that involved the issue of whether physical presence was necessary to establish nexus under the Commerce Clause. That case, *Lanco, Inc. supra* note 20, involved an out-of-state company that

licensed intangible property to an affiliate present in the state. The facts in *Lanco* are similar to the facts in *Geoffrey* and could have broad implications for related corporations that license intangibles to affiliates. *Certiorari* was denied in that case as well.

³² Petition for Writ of *Certiorari* at 16, see *MBNA*, W.Va. SCt, 640 SE2d 226 (2006).

³³ *J.C. Penney Nat’l Bank v. Johnson*, Tenn. CtApp, 19 SW3d 831 (2000), *aff’d*, No. M1998-00497-SC-R11-CV (Tenn. May 8, 2000), *cert. denied*, 531 U.S. 927, 121 SCt 305 (2000).

³⁴ *Dillard Nat’l Bank v. Johnson*, No. 96-545-III (Davidson Cty. Chanc. Ct. Jun. 22, 2004).

³⁵ See e.g., *Petition of Barnes & Noble.com*, No. 89872, Cal. State Bd. of Equaliz. (Sept. 12, 2002), available at www.boe.ca.gov/legal/pdf/bncom.pdf; *BordersOnline, LLC v. State Bd. of Equalization*, 129 CalApp4th 1179, 29 CalRptr3d 176 (2005).

³⁶ Ind. Code §6-2.5-8-10(a).

³⁷ Ind. Code §6-2.5-8-10(f).

³⁸ Several courts have rejected the argument that a mere ownership affiliation with an in-state entity, even in the context of a unitary relationship, is sufficient to establish nexus for an out-of-state seller. See, e.g., *SFA Folio Collections, Inc. v. Tracy, Tax Comm’r*, Ohio SCt, 73 OhioSt3d 119, 1995 Ohio 130, 652 NE2d 693 (1995); *Current, Inc. v. State Bd. of Equalization*, Cal. CtApp, 24 CalApp4th 382, 29 CalRptr2d 407 (1994); *SFA Folio Collections, Inc. v. Bannon*, Conn. SCt, 217 Conn 220; 585 A2d 666 (1991).

³⁹ See e.g., Ala. Code §40-23-190(a); Ga. Code Ann. §48-8-2(3)(j).

⁴⁰ Business Activity Tax Simplification Act of 2007, SB 1726, 110th Cong. (June 28, 2007).

⁴¹ States also may lobby Congress for a law that might provide clarity. For example, bills that would overturn the Court’s physical presence ruling in *Quill* have been introduced several times in the last 15 years, but such a law has not been enacted. See, e.g., “Sales Tax Fairness and Simplification Act,” S. 2152, 109th Congress (1st session), introduced Dec. 20, 2005, and reintroduced as S. 34 on May 22, 2007, 110th Congress (1st session), which would allow states to impose a sales tax collection responsibility on remote sellers regardless of whether the company had a physical presence in the state.

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